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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 862

PENNSYLVANIA WATER & POWER COMPANY,
A CORPORATION,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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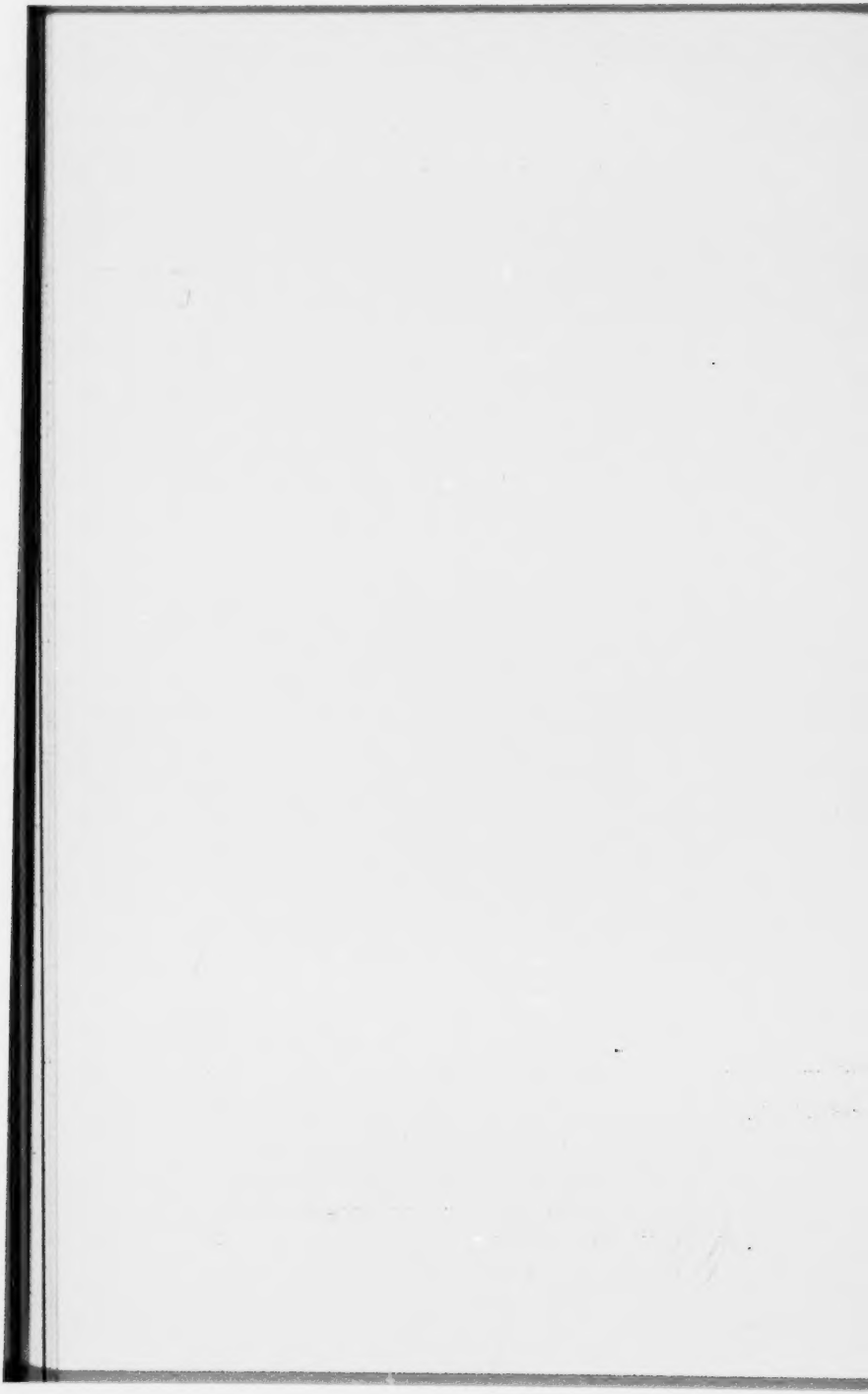

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vs.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Pennsylvania Water & Power Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia in the above cause, entered October 20, 1941 [R. 2322], affirming an order of the respondent, Federal Power Commission (hereinafter called the Commission), dated November 3, 1939 [R. 215], that petitioner shall file an application for a

license under the Federal Power Act to operate and maintain, in the Susquehanna River at Holtwood, Pennsylvania, its dam and power plant—which it has operated and maintained ever since 1910, without question by any branch or agency of the Government until institution of this proceeding by the Commission in 1938.

STATEMENT OF THE MATTER INVOLVED.

The Instant Proceeding.

On September 2, 1938 the Commission issued an order reciting that petitioner "operates and maintains, for the purpose of developing electric power," its dam, reservoir and power house, commonly called the Holtwood development, across and in the Susquehanna River at McCall's Ferry, near Holtwood, Pennsylvania, and that the Susquehanna is a navigable water of the United States from and above the reservoir so operated to its mouth in the Chesapeake Bay. The order directed petitioner to show cause "why appropriate proceedings should not be instituted against" it "for operating and maintaining the said Holtwood development, without a license granted pursuant to the Federal Power Act or a permit or valid existing right-of-way granted prior to June 10, 1920" [*not* "for failure to obtain a license pursuant to the Federal Power Act", as inadvertently stated in the lower Court's opinion]. [R. 27-28, 2308; 123 F. 2d 157]. Petitioner filed an answer admitting the maintenance of the development [*not* "without permit or other authority", as stated in the lower Court's opinion], but denying that the Susquehanna is a navigable water of the United States from above petitioner's reservoir to the Chesapeake Bay or at the site of the Holtwood development, and averring "that in any event there is no occasion for any proceedings against it for operating or maintaining the Holtwood development", and that

the Commission "has no jurisdiction over" it "to institute any such proceedings against it". [R. 28, 3308; 123 Fed. 2d 157]. On November 1, 1938, the Commission issued an order, instituting "an investigation * * * to determine all facts, conditions, or matters relating to the navigability of the Susquehanna River, and the authority under which the Holtwood development is maintained and operated in said river; and whether an order of the Commission appropriate, expedient and in the public interest should be issued to conserve and utilize the navigation and water power resources of said region", and fixing a date for "a public hearing * * * to ascertain all facts pertaining to this investigation and to any other issues raised by the order to show cause and the answer thereto". [R. 29-30].

After the hearing, before an examiner, and the filing of briefs, the Commission on November 3, 1939 issued its opinion (holding that "the Holtwood Project is located * * * in navigable water of the United States" [R. 211]) and its order that petitioner "file with the Commission an application in accordance with the Rules of Practice and Regulations of the Commission for a license under the Federal Power Act to operate and maintain the Holtwood project." [R. 215].

The Commission asserts jurisdiction to make this order under section 4(g) of the Federal Power Act,[1] (inserted

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[1] Sec. 4. The Commission is hereby authorized and empowered—

* * * * * *

(g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign na-

by amendment by the Act of 1935) [R. 201]. Petitioner denies the Commission's jurisdiction to make the order —or any order stopping the operation and maintenance of its dam. [R. 19-22].

In its opinion the Commission says:

> "It has been suggested that the Commission may require that the project be removed or entirely reconstructed. There is nothing in the record however which would support a conclusion that such an order would be expedient and in the public interest in this case. We therefore conclude that an appropriate order in this case is an order requiring the respondent to apply for a standard form license under the Act." [R. 207].

There is indeed nothing in the record which would support a conclusion that destruction or reconstruction—or cessation of maintenance and operation—of petitioner's dam would be expedient or in the public interest. On the contrary, the Commission's (unsupported) statement that the *river* is "suitable" for transportation [R. 206] is predicated upon its (unsupported) "finding" that the *Holtwood pool* is "suitable", *i. e.*, upon *utilization* of petitioner's *dam*, and construction of locks in it, as part of the "improvements" in the river necessary to *make* it navigable. [R. 211, 66, 132, 141].

Nor is there anything in the record—or in the Commission's opinion or findings—to indicate that "improve-

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tions and among the several States by any person, corporation, state or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region. [Federal Water Power Act, June 10, 1920, c. 285, §4, 41 Stat. 1063; as amended, August 26, 1935, c. 687, Title II, 49 Stat. 838; §797, Title 16. U. S. C. Appendix, *infra*, 42].

ments" *necessary* to make the river navigable would be *"reasonable"*, or *useful*, improvements. The War Department reports over the last fifty years show the contrary [*infra*, 8-10, 15-16]. There is nothing (except these reports) to show what such "improvements" might cost or whether they would be feasible at all. [R. 60-61]. There is nothing, in the reports or elsewhere, to show that such "improvements" (regardless of cost) would be practically useful for commerce. On the contrary, the great number of locks necessary would increase the delays of transportation [*infra*, 10].

Application for rehearing was denied by the Commission. [R. 216-229, 230-231, 2308-2309].

Petitioner filed in the United States Court of Appeals for the District of Columbia, under section 313(b) of the Federal Power Act [U. S. Code, Title 16, §825l; Appendix, *infra*, 44], a petition for review of the Commission's order [R. 1-23]. On such review the Court affirmed the order [R. 2307-2322. *Pennsylvania Water & P. Co. v. Federal Power Com'n*, 123 F. 2d 155].

Petitioner's Dam.

Construction of petitioner's dam at Holtwood (near McCall's Ferry) was begun by McCall Ferry Power Company in 1905 and completed by petitioner in 1910. Petitioner acquired the property in 1910 in a reorganization through foreclosure. Ever since 1910, the dam and power plant have been maintained and operated by petitioner [R. 1-2, 207-208, 127-130]. The dam is about 24.5 miles above the mouth of the Susquehanna, 19.5 miles above tidewater, 9.5 miles above the Maryland line and 18 miles below Columbia [Commission's Exhibit No. 5, not printed; Commission's Exhibit No. 19, R. 447; R. 2308, 123 F. 2d 156-157].

The dam was built under the Pennsylvania Mill Dam Act of 1803,[2] which authorizes owners of lands adjoining any "navigable" stream, "declared by law a public highway"[3] (except the Delaware, Lehigh and Schuylkill), to erect dams, provided they "shall not obstruct or impede the navigation of such stream". In other words, the owner of a dam on the Susquehanna assumes the risk that his dam may obstruct navigation *if* the river is ever made navigable in fact by "improvements". By a decree dated January 14, 1907, in a case of *Pennsylvania v. McCall Ferry Power Co.*, in a state court, the

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[2] 4 Smith's Laws, Ch. 2342; Purdon's Pennsylvania Statutes (1930), Title 55, ch. 10, Secs. 291-293.

[3] By Act of March 31, 1785, (2 Smith's Laws, Ch. 1144) the Susquehanna was declared to be "a public highway" in all parts thereof within the state. In Pennsylvania terminology, a stream that has been declared to be a "public highway"—or to be "navigable"—is *not* necessarily navigable *in fact*. It is navigable *in law, i. e.*, subject to the public easement of navigation *if* and when it is *made* navigable *in fact*. In this sense only, the Susquehanna has been referred to, by the Supreme Court of Pennsylvania, as a "navigable" river. *Carson v. Blazer* (1810) 2 Bin. (Pa.) 475, 477-478. *Commonwealth v. Fisher* (1830), 1 Pen. & W. 462, 467. *Zimmerman v. Union Canal Co.*, (1841), 1 Watts & Serg. 346, 351. *N. Y. & Erie R. Co. v. Young* (1859), 9 Casey 175. *Craig v. Kline* (1870), 65 Pa. 399, 411-412. *Freeland v. Pennsylvania R. Co.* (Pa. 1901), 47 Atl. 745, 746. *Appeal of York Haven Water & Power Co.* (1905) 212 Pa. 622. *Post v. Wilkesbarre Connecting R. R.* (1926), 286 Pa. 273, 277. *York Haven Water & Power Co. v. York Haven P. Co.*, (C. C. A., Third Circuit, 1912), 201 Fed. 270. *Keystone Wood Co. v. Susquehanna Boom Co.*, (C. C. A., Third Circuit, 1917) 240 Fed. 296, 298. In Maryland, as in Pennsylvania, the statutes declaring the Susquehanna a public highway do *not* evidence navigability *in fact*, but the contrary. *Mayor and City Council of Havre de Grace v. Harlow*, 129 Md. 265, 274, 275-278.

right to construct and maintain this dam was held subject to the condition that whenever the navigation of the Susquehanna "shall hereafter be improved either under State or Federal requirement in such way and manner as will secure by the additional construction of a proper lock, or locks, a continuous navigation of said river between Columbia and Havre de Grace", such locks shall be erected by "the defendant corporation and its assigns" at their own expense. [Exhibit No. 65; R. 1463-1464].

The Susquehanna would have been a most important inland waterway *if* in its natural and ordinary condition it had been—or by reasonable improvements it could have been made—navigable for useful commerce of a substantial and permanent character. It was and is, however, navigable only at tidewater (*i. e.*, in Maryland five miles up from its mouth in the Chesapeake Bay) and also in certain unrelated reaches in Pennsylvania and New York (all above Columbia, which is 37.5 miles above tidewater). By reason of its steep slope and large drainage area and the consequent wide variations in amount, depth and velocity of water flow, the lower Susquehanna (between tidewater and Columbia) can not be made navigable for useful commerce—except at prohibitive cost[4] [R. 2314-2316, 123 F. 2d 160-161].

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[4] Common belief that the lower Susquehanna could readily be made navigable was dispelled by experience. Beginning in 1785 individuals, private corporations and public authorities in Pennsylvania and Maryland spent effort and money in the attempt to make the lower Susquehanna navigable. Later, through public and private expenditures, canals were constructed along the banks of the river, paralleling the river from tidewater to the New York State line. The same natural conditions that made the river unnavigable resulted in failure and ruin

For more than 50 years no substantial commercial navigation has existed on the lower Susquehanna or (except in disconnected reaches) on the upper Susquehanna, either in the natural and ordinary condition or any "improved" condition of the river.

Under various Acts of Congress, surveys have been made by Army engineers and full reports transmitted to Congress by the Secretary of War.[5] As the result of these surveys and reports, Congress made twenty appropriations, aggregating $265,390 (between 1852 and 1911), for improvements of the Susquehanna at tidewater; three of $15,000 each (1880, 1881 and 1882) for improvements near Wilkesbarre; and *not one appropriation for improvement of the lower Susquehanna.* [Commission's Exhibit No. 9; R. 234, 236.]

As the lower court says in its opinion,

> "From time to time over the last 50 years surveys of the river with relation to its navigability have been made by the engineer corps of the Army, resulting in reports that the steep slope and rocky bed of the river render impracticable an adequate improvement by open channel means and that to make

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of the canals through repeated floods. The only fruit of the effort to make the river itself navigable was a limited raft and ark traffic down the river during flood seasons. This abnormally dangerous and expensive traffic for a time attained large volume. It was a by-product of the attempt to make the river navigable and the construction of canals; it disappeared with these transitory conditions.

[5] In 1824 President Monroe was requested "to order a general survey" of the Susquehanna and its branches and an estimate of "the probable expense of clearing the river of its obstructions and of a canal from Conewago Falls [above Columbia] to tidewater, if practicable" [Exhibit No. 129; R. 2127].

> the river navigable for commerce would necessitate the expenditure of millions of dollars." [R. 2316, 123 F. 2d 160].

One such report, dated December 20, 1890, under the Rivers and Harbors Act of 1890[6], related particularly to the West Branch [*i. e.*, above Northumberland], but stated that improvement for navigation purposes would be of little value unless continued to Havre de Grace, and concluded that the river was not worthy of improvement.[7] A report under the Rivers and Harbors Act of 1902,[8] received by the House of Representatives on December 18, 1903,[9] concerning an examination of the Susquehanna below Northumberland [*i. e.*, including the whole of the lower Susquehanna], stated that the benefits to be derived from any improvement for navigation purposes "would prove entirely incommensurate with the cost and * * * it is undesirable for the United States to undertake this improvement" [R. 348], that making the Susquehanna navigable for large sized ocean vessels "would be a work comparing in magnitude with the Nicaragua Canal", and "would probably cost nearly half as much as the entire sum appropriated by the Government for river and harbor improvements throughout the country during the entire nineteenth century" [R. 359], that for boats of 6 to 10 feet draft the number of dams would be great and the cost 20 to 30

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[6] September 19, 1890, c. 907, 26 Stat. 454.

[7] House Document No. 136, 51st Congress, 2d Session, Report on examination of the West Branch of the Susquehanna; Exhibit No. 95; R. 1835, 1839-1840.

[8] June 13, 1902, c. 1079, 32 Stat. 330, 376, 382.

[9] House Document No. 219, 58th Congress, 2d Session; Commission's Exhibit No. 18; R. 347.

millions of dollars [R. 349], and that such an increase in the number of locks would increase the delays of transportation and thereby militate against the practicability of using such a waterway for commercial purposes. [R. 361].

CHIEF JUSTICE TANEY'S *Opinion.*

In *The Propeller Genesee Chief v. Fitzhugh,* 12 How. 443, 455, decided at the December Term, 1851, the Court by CHIEF JUSTICE TANEY said (referring to the English definition of admiralty jurisdiction):

> "At the time the Constitution of the United States was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. In the old thirteen States the far greater part of the navigable waters are tide waters. And *in the states which were at that period in any degree commercial, and where courts of admiralty were called on to exercise their jurisdiction, every public river was tide water to the head of navigation.*" [Italics supplied].

These italicized words were fully applicable to the Susquehanna. For fifteen years CHIEF JUSTICE TANEY, as Circuit Justice, had been presiding over appeals from the only admiralty court that had jurisdiction over the Susquehanna tidewater. His own recollection went back to the time of the adoption of the Constitution.

SECRETARY TAFT'S *Decision.*

Within three months after the report under the Rivers and Harbors Act of 1902 [*supra,* 9-10], the P. B. & W. (now Pennsylvania) Railroad Company submitted plans for a new bridge over the Susquehanna at Havre de Grace (*i. e.,* at tidewater) to the Chief of Engineers and

the Secretary of War for approval under the proviso in Section 9 in the Rivers and Harbors Act of 1899[10]

> "That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced:"

This application presented two questions, [1] whether the lower Susquehanna (at, above and below the Pennsylvania line) was a navigable water of the United States and [2] if not, whether the Susquehanna at tidewater in Maryland and the navigable reaches of the *upper* Susquehanna in Pennsylvania were to be regarded as one and the same river within the meaning of the proviso.

On March 8, 1904, SECRETARY TAFT decided both questions (the second *not* material in the instant case) in the negative in the following ruling:

> "Brig. Gen. John Newton,
> Chief of Engineers, U. S. A.
> War Department,
> Washington.
>
> "In the absence of Assistant Secretary Oliver, I have re-examined the questions as to whether the Susquehanna River can be said to be a navigable river within the provisions of the act of Congress requiring that navigable rivers in two States shall not be crossed by bridges, except by authority of Congress, or should be considered as navigable river within one State, consent to cross which may be

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[10] March 3, 1899, c. 425, 30 Stat. 1151, section 9; U. S. Code, Title 33, §401; Appendix, *infra*, 41.

given by the Legislature of the State, with the approval of the Secretary of War.

"My own judgment is that in the present condition of the Susquehanna River it is navigable only within one State. There is no interstate navigation such as was in the mind of Congress in making the distinction. For this reason the consent of the Secretary of War will be regarded as sufficient, and the construction of the bridge allowed in accordance with plans to be approved by this Department. This conclusion is reached on the assumption that the State of Maryland has already consented to the erection of the bridge.

Wm. H. Taft,
Secretary of War.

March 8, 1904."

[Exhibit No. 91; R. 1591].

Concerning this decision, the lower court in its opinion says:

"The decision of Secretary Taft was made in the light of the then established rule that the navigable waters of the United States were confined to those used or susceptible of being used *in their ordinary condition* as highways of commerce by water, and based on that rule the decision was clearly right." [R. 2319, 123 F. 2d 162].

For ten years this decision was consistently followed by the War Department, with the acquiescence of Congress, as a working rule,—a practical administrative construction of the Act of 1899, *as applied to the Susquehanna.* For 34 years (until initiation of the instant proceeding by the Commission on September 2, 1938) SECRETARY TAFT'S decision was accepted by the Government as settling acts done and closed under this practice.

The report of the Chief of Engineers for the year ended June 30, 1904,[11] stated that plans and locations for the Pennsylvania Railroad bridge had been approved under the proviso in section 9 of the Act of 1899. The reports for 1907 and 1908[12] made similar statements concerning a new B. & O. bridge at Havre de Grace. Both the Pennsylvania and B. & O. bridges are still in use; neither was expressly authorized by Act of Congress. [Exhibit No. 98; R. 1875].

Mr. (now Mr. JUSTICE*)* FRANKFURTER'S *Memorandum.*

In 1907 the War Department approved the location and plans for a proposed dam to be built across the Susquehanna at Conowingo, Maryland [*i. e.*, near tidewater]. In February, 1913 application was made for approval of a relocation of the proposed dam. Mr. (now Mr. JUSTICE) FRANKFURTER then submitted to the Secreary of War a memorandum saying that the 1907 approval was based on SECRETARY TAFT'S decision of March 8, 1904. In his memorandum Mr. FRANKFURTER also said:

> "SECRETARY STIMSON directed an inquiry into the present condition of the navigability of the Susquehanna River. The Chief of Engineers reports that the conditions since the ruling of SECRETARY TAFT are unchanged, and that the navigable reach of the river is still wholly within the limits of the State of Maryland. Therefore the application for the re-

[11] House Document No. 2, 58th Congress, 3d Session; Annual Reports of the War Department for the fiscal year ended June 30, 1904, Vol. V, Report of the Chief of Engineers, Part I, pp. 711, 713, 718. *Cf.* Commission's Exhibit No. 9, R. 234, 259.

[12] Report of the Chief of Engineers (1907), pp. 816, 819, 823. *Cf.* Commission's Exhibit No. 9, R. 261. Report of Chief of Engineers (1909), p. 914.

> location of the dam by the Susquehanna Power Company may be authorized by the department if properly supported by the authority of the Legislature of Maryland and if the location and plans for the dam are such as to receive the approval of the Chief of Engineers and the Secretary of War." [Commission's Exhibit No. 11; R. 289].

In June, 1914, in an opinion to the Secretary of War on an application for approval of new plans for the proposed Conowingo dam, the Judge Advocate General expressed the view that SECRETARY TAFT'S decision "in the Pennsylvania Railroad bridge case" was "erroneous in law", and recommended that it be not followed, in view of the fact that *nothing had yet been done or spent on actual construction.* He concluded:

> "I recommend that applicant company be notified that it is the view of the present Secretary of War that the consent of Congress, under existing law, must be obtained for the construction of a dam across the Susquehanna River. The Secretary may be inclined to question the equitableness of such a step at this stage of the proceedings, but it is clear that the present proposition is one *de novo* and should be considered independently of all previous applications. Furthermore, notwithstanding the approval of this company's original plans was given seven years ago, nothing has been done yet on actual construction. This case does not involve the question of the power to rescind a permit after the permittee, in good faith, has made contracts and spent sums of money upon the strength of the permit. It is not a question of rescission at all, but of a new approval. It is not a question of a lawful permit having been given in the first instance, but of an unauthorized approval. So, too, nothing has been spent on actual construction. In my judgment it is better law and better policy to stop the matter here." [Commission's Exhibit No. 11; R. 298-299].

Under the Rivers and Harbors Act of 1919[13], a survey was made of the Susquehanna from Harrisburg to the mouth. The reports, received by the House of Representatives on January 6, 1926, comprise 85 pages of the printed Record.[14] They cover the possibilities of navigation, power development and coordinated development of both. They contain a description of petitioner's dam and power plant ("the largest hydroelectric plant in the State" [R. 393, 2308, 123 F. 2d 157]), proposed additional generating units, and possible inclusion of petitioner's development as "an integral part" of a coordinated navigation and power development; and a statement of petitioner's history and financial condition and the legal status of its dam under SECRETARY TAFT'S decision and the Pennsylvania decree of January 14, 1907 [R. 365, 370, 393-396, 409-410, 419-422].

The reports concluded (among other things) that it would be necessary to canalize the river; that it would be more desirable to do this for a combined navigation and power project than for navigation alone; that the Holtwood development "would become an integral part of the proposed project"; that the estimated cost of the combined project was $114,400,000, including $14,400,000 for locks, channel work and a movable dam, to be charged to navigation, but with the navigation feature eliminated the cost of the power development would be less than the $100,000,000 estimated. The reports recommended "that no navigation improvement be undertaken" and "that the development of the river for power purposes should be left to private interests, with suitable safeguards looking to the possibility of future navi-

[13] March 2, 1919, c. 95, 40 Stat. 1275, 1287-1288.

[14] House Document No. 186, 69th Congress, 1st Session; Commission's Exhibit No. 19; R. 365-447.

gation developments" [R. 364-367]. The reports contained the following statements:

> "The power possibilities of the Susquehanna River are of interest to the Federal Power Commission and" the views expressed by the Board of Engineers in a report dated November 16, 1920 "are based upon a conference with the engineer officer attached to that commission" [R. 381].
>
> "* * * The dam at Holtwood was not built under an act of Congress and a Federal permit, presumably because it was constructed at a time when the Susquehanna River, under a decision of the Secretary of War on March 8, 1904, was considered to be a stream whose navigable portion lay entirely within the State of Maryland. This decision was reversed in 1914 by a succeeding Secretary of War, but by that time the dam had been completed. It therefore appears to be a matter requiring determination in the courts whether the Federal laws for the protection and preservation of navigation could be invoked to require the company to build locks necessary to pass the dam. The company has not applied for a license under section 23 of the Federal water power act. Definite legal power to enforce the construction of locks is, however, conferred by the following decree of the court of common pleas of Dauphin County, Pa.:" (quoting the decree, [*supra*, 6-7]). [R. 419, 421-422].

Statement to Congress by the Commission's Counsel.

The amendments to the Federal Water Power Act of 1920 made by Title II of the Public Utility Act of 1935[15] were requested by the Commission. These amendments were explained to the Committees of Congress by the Commission's Chairman and by Mr. DeVane, one of its

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[15] August 26, 1935, c. 687, 49 Stat. 797.

counsel. In explaining one of the amendments, Mr. DeVane said:

> "Holtwood on the Susquehanna River is a dam that was constructed in 1910 under permit of the War Department."[16]

This is not a technically accurate statement of law, but it is a clear recognition *by the Commission* of the *fact* that petitioner's dam was lawfully constructed under SECRETARY TAFT's decision and maintained *with the consent of Congress and the entire Government.*

JURISDICTION OF THE SUPREME COURT.

This Court has jurisdiction to review the judgment in question under section 313(b) of the Federal Power Act [U. S. Code, Title 16, §8251; Appendix, *infra,* 44] and section 240(a) of the Judicial Code, as amended [U. S. Code, Title 28, §347(a)].

THE QUESTIONS PRESENTED.

I(*a*) Is the Commission—or could it constitutionally be—authorized, by any statute, to order anybody to accept—or apply for—a license?

(*b*) When a dam has been operated ever since 1910, and destruction of the dam or cessation of operation would *not* be expedient or in the public interest, to conserve or utilize navigation or water-power resources,

Is the Commission—or could it constitutionally be—authorized by the Act of 1935, by section 4(g) inserted in the Federal Power Act, to *order* maintenance and operation of the dam stopped *for the sole purpose of exacting ransom for not stopping it?*

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[16] Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 74th Congress, 1st Session, on H. R. 5423, page 486.

(c) By the Act of 1935, by section 4(g), is the Commission given jurisdiction—and is the jurisdiction of the courts under the Rivers and Harbors Act of 1899 thereby ousted—to determine whether a dam has been unlawfully maintained and operated ever since 1910?

II(a) Does the Act of 1935, by amending section 23 of the Federal Power Act, make unlawful the continued operation and maintenance of a lawfully constructed dam operated ever since 1910?

(b) Congress and the entire Government, before and ever since 1899, having recognized that, *at least for practical purposes,* the Susquehanna is not, and can not by "reasonable improvements" be made, navigable for useful commerce,

Is the Susquehanna a navigable water of the United States *within the meaning of the Rivers and Harbors Act of 1899?*

(c) Petitioner's dam having been constructed (from 1905 till 1910) and operated under the Pennsylvania Mill Dam Act of 1803, with the prior and subsequent *consent* of Congress, *implied* (if not expressed) in the acts and statements of the executive, legislative and judicial departments of the Government for many years before and since it was constructed—including a practical administrative construction of the Rivers and Harbors Act of 1899, *as applied to the Susquehanna,* by SECRETARY TAFT in 1904, followed by the Government for at least ten years and, as to things then done, for 34 years—

Is the dam unlawfully operated and maintained?

(*d*) SECRETARY TAFT'S decision in 1904, followed by Mr. (now Mr. JUSTICE) FRANKFURTER in 1913, being a practical administrative construction of the Act of 1899, *as applied to the Susquehanna River* —which was followed by the Government for at least ten years and, as to things then done, for 34 years, and on the faith of which petitioner's dam, as well as the Pennsylvania and B. & O. railroad bridges, were built—

Did Congress, by the Act of 1935, authorize the Commission to *retroactively overrule* this administrative construction, so as to outlaw a dam built on the faith of this construction and operated without Governmental objection for twenty-five years?

REASONS RELIED ON FOR ALLOWANCE OF CERTIORARI.

The United States Court of Appeals for the District of Columbia has decided novel and substantial questions of general importance, relating to the construction and application of provisions of the Federal Power Act (and the constitutionality of such provisions, *as so construed),* which should be settled by this Court, and has failed to give proper effect to the applicable decisions of this Court.

The lower Court bases its decision principally on the decision of this Court in *United States v. Appalachian Power Co.,* 311 U. S. 377. In so doing it fails to give proper effect to the limitations, expressed [311 U. S. 419, 420-421, 423] or inherent, upon the scope of that decision, and gives undue and improper scope to that decision as overruling previous decisions. In the *Appalachian* case the decision was limited to questions as to "the consti-

tutional power of the United States over its waters" [311 U. S. 426]. The case was instituted under the Act of 1899. Questions as to the *construction* of the Act of 1935—or the Federal Water Power Act of 1920—or the *powers* of the *Commission, under those Acts*—were *not* decided.

(*a*) Neither in the *Appalachian* case nor in any other case has this Court held that the Commission—or any other Governmental agency, or any court—is authorized to *order* anybody to accept—or apply for—a license. In the *Appalachian* case this Court directed entry of [1] an order *enjoining construction,* maintenance or operation "otherwise than under a license", accepted within a reasonable time, "substantially in the form tendered" by the Commission on May 5, 1931, *or,* [2] in the alternative, a mandatory order of *removal* [311 U. S. 429, 401; *cf.* 311 U. S. 424].

(*b*) In the *Appalachian* case the controversy arose *before construction* was begun. The bill was filed within a year after the beginning of construction and a few months before passage of the Act of 1935. The Circuit Court of Appeals held that the Act of 1935, in amending section 23 of the Federal Water Power Act of 1920, is *not* retroactive [107 F. 2d 169, 175]. This Court did *not* disapprove this ruling, or give any retroactive effect to the 1935 amendments of section 23. In the instant case the lower Court construes the prohibitions of section 23 as retroactive [R. 2320-2321; 123 F. 2d 163], citing a passage in this Court's opinion in the *Appalachian* case, which does *not* support such retroactive construction and application [311 U. S., bottom of page 426].

(*c*) The lower Court cites *Greenleaf-Johnson Lumber Co. v. Garrison,* 237 U. S. 251, as "conclusive" that SEC-

RETARY TAFT's decision in 1904, "even if relied on by petitioner in the erection of its dam, affected in no sense the power of Congress to require its abatement * * *" [R. 2320; 123 F. 2d 162-163]. But in that case *demolition* of a wharf was *required* "in the interests of commerce and navigation", *i. e.*, in the *exercise* of the *power to regulate commerce.* It was *not* held that Congress could *order* demolition merely *to exact ransom for not demolishing.* On the contrary, in *United States v. River Rouge Improvement Co.*, 269 U. S. 411, 419 and again in *Wisconsin v. Illinois*, 278 U. S. 367, 415, this Court held that Congress "may not arbitrarily destroy or impair the rights of riparian owners by legislation which has no real or substantial relation to the control of navigation or appropriateness to that end." The lower Court quotes these cases as overruled by the *Appalachian* case [R. 2312; 123 F. 2d 158]. But these cases were *not* overruled; they were *limited only* to the extent of expanding "control of navigation" to "control of navigation *or water-power*" or (at most) to "control of *commerce*". [311 U. S. 424-426]. So limited, these cases still prevent use of the commerce power, however broad, as a *pretext,* to exact ransom for *not* exercising the power by *wantonly destroying property.*

(*d*) The *Applachian* case, and other cases defining the *powers* of Congress, do *not* touch any questions of *construction* of the Act of 1935, *e. g.*, sections 4(g) and 23. Even if the *powers* of Congress are as broad as the lower Court holds they are, the question remains whether [1] Congress has conferred such arbitrary power *on the Commission* or [2] as Mr. JUSTICE HOLMES has said, the United States "prefers to consider itself civilized and to act accordingly". [*Disconto-Gesellschaft v. United States Steel Corp.*, 267 U. S. 22, 28].

(*e*) These novel and substantial questions of *construction* of the Act of 1935, as to the powers and jurisdiction of the Commission (and the kindred questions as to the *powers* of Congress) are of general importance and should be settled (and can only be settled) by this Court.

In *Safe Harbor Water Power Corporation v. Federal Power Commission*, 3 Cir., F. 2d , decided December 2, 1941, the Court set aside an order of the Commission as beyond its jurisdiction. The order purported to fix rates, under section 20 of the Federal Power Act, for power sold in Pennsylvania and Maryland by a Pennsylvania licensee under the Act. The Commission had never before exercised its ratemaking powers under section 20. Section 20 (enacted by the Federal Water Power Act of 1920 and *not* amended by the Act of 1935) confers upon the Commission jurisdiction to regulate interstate rates of licensees "whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State * * * or such States are unable to agree through their properly constituted authorities * * * on the rates". Pennsylvania and Maryland had provided commissions and were *not* unable to agree on rates. In the Circuit Court of Appeals the Commission suggested somewhat vague and strained reliance on provisions of the Act of 1935, as reflecting on the construction of the unchanged provisions of section 20, enacted in 1920. The Commission has announced to the press, and to the Circuit Court of Appeals, its intention to apply for the writ of certiorari in that case.

Refusal in the *Safe Harbor* case to stretch the plain words of the hitherto unused provisions of section 20 does not present questions of any such general or far-reaching importance as those presented in the instant

case. By the lower Court's construction apparently innocent generalities, in "minor" amendments requested and obtained by the Commission in the Act of 1935, confer sweeping *retroactive* powers to destroy, or hold to ransom, property rights exercised for 28 years without question by any branch or instrumentality of the Government and in reliance on the administrative action of the Commission's own predecessors, including SECRETARY TAFT and Mr. FRANKFURTER.

Wherefore your petitioner submits that this petition for the writ of certiorari should be granted as prayed.

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